

**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

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| In the Matter of: |) | Docket No. 00-AFC-1C |
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| GATEWAY GENERATING STATION |) | STAFF RESPONSE |
| |) | AND RECOMMENDATIONS |
| |) | TO COMPLAINT |
| |) | BY ASSOCIATION OF |
| |) | COMMUNITY ORGANIZATIONS |
| _____ |) | FOR REFORM NOW (ACORN) |

SUMMARY

On June 5, 2009, the Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN) filed a Complaint pursuant to California Code of Regulations, Title 20, section 1237 regarding the operational status and efficiency of the Gateway Generating Station (Gateway), which is owned and operated by Pacific Gas and Electric (PG&E).

The complaint alleges that PG&E does not have a valid certification for Gateway, that PG&E violated the law by not complying with the applicable Air Quality Standards before constructing and operating the facility, that PG&E violated the conditions of certification by not obtaining the required emissions offsets, and that PG&E violated the Energy Commission's requirements for the opportunity of public participation before construction and operation of the facility. ACORN requests that the Commission revoke PG&E's certification for the project.

Staff initiated its investigation into the allegations raised in the Complaint and, for reasons explained below, recommends that the committee order that the Complaint be dismissed for insufficiency and lack of merit or consolidated with the ongoing review of PG&E's May 9, 2009 Petition to Amend Gateway, which is projected to be considered for approval at the August 26, 2009 Business Meeting.

I. BACKGROUND

Gateway (formerly known as the Contra Costa Power Plant Unit 8) was certified by the Energy Commission on May 30, 2001. The facility is located on Wilbur Avenue, east of the city of Antioch, in Contra Costa County. Construction of the facility started late in 2001 and was suspended in February of 2002 due to financial difficulties of the owner Mirant Delta, LLC. On July 19, 2006, the Commission approved the addition of PG&E

as co-owner of the project with Mirant. On January 3, 2007, the Commission approved PG&E's petition to remove Mirant as a co-owner and change the name of the facility to the Gateway Generating Station.

On December 19, 2006, PG&E filed a petition with the Commission to amend the Energy Commission's Decision (decision) on Gateway. The Petition sought to replace the wet cooling tower and surface condenser with an air cooled condenser (ACC), eliminate the use of steam power augmentation, and eliminate the use of San Joaquin River water as the cooling water source for Gateway, as well as other minor changes associated with the proposed amendment. The Commission approved this petition on August 1, 2007. PG&E restarted construction in February of 2007 and although not 100% completed, began commercial operation on January 4, 2009.

On January 16, 2008, PG&E filed a Petition to Amend, proposing certain minor equipment changes and Air Quality Conditions of Certification in concert with the August 1, 2007 amendment. That petition was withdrawn on February 13, 2009, and a new Petition to Amend was filed on May 8, 2009, again requesting certain minor changes to the project. Those changes include the following:

- Replace the permitted natural gas-fired preheater with a smaller dewpoint heater and increase allowable daily hours of operation.
- Replace a motor driven fire water pump with a 300 kW Diesel fire pump at the facility.
- Revise the facility PM10 emission limits to reflect elimination of the wet cooling tower.
- Revise references to "Contra Costa Unit 8" and "CC8" to reflect the current project name.
- Delete references to power augmentation.
- Make other minor conforming changes for consistency with the District issued permit.

That petition is now being analyzed by staff, and will be discussed during the Commission Business meeting agenda on August 26, 2009 for possible approval.

II. INVESTIGATION AND ANALYSIS

Title 20, California Code of Regulations, section 1237(a), provides in relevant part:

Any person must file any complaint alleging noncompliance with a commission decision...solely in accordance with this section. All such complaints...shall include the following information:

(1) the name, address, and telephone number of the person filing the complaint (complainant);

- (2) the name, address, and telephone number of the person owning or operating, or proposing to own or operate, the project which is the subject of the complaint;
- (3) a statement of facts upon which the complaint is based;
- (4) a statement indicating the statute, regulation, order, decision, or condition of certification upon which the complaint is based;
- (5) the action the complainant desires the commission to take;
- (6) the authority under which the commission may take the action requested, if known, and;
- (7) a declaration under penalty of perjury by the complainant attesting to the truth and accuracy of the statement of facts upon which the complaint is based.

The Complaint, filed by ACORN under Title 20, California Code of Regulations, section 1237, fails to specify all the Conditions of Certification that it claims are being violated and, therefore, fails to provide all the information required in a complaint alleging noncompliance with a Commission decision. (See, Cal. Code Regs., tit. 20, § 1237, subd.(a)(4), which requires “a statement indicating the statute, regulation, order, decision or **condition of certification** upon which the complaint is based;” [emphasis added].) The complaint should be dismissed, therefore, for insufficiency of the complaint. ACORN instead asserts four “counts” against PG&E. In the following sections, staff addresses each of these counts separately to show that they should result in dismissal of the complaint for lack of merit.

COUNT 1. PG&E Is Violating the Law by Not Having a Valid Certification Before Constructing and Operating the Facility.

Gateway was certified by the Commission on May 30, 2001. Pursuant to Public Resources Code section 25523, the Commission prepared a written decision in this matter, which was adopted at a regularly scheduled and publicly noticed business meeting. The written decision included specific findings that the facility conformed with public safety standards, applicable air and water quality standards, and other applicable local, regional state, and federal standards, ordinances, and laws as required by Section 25523(d)(1). The decision was never challenged during the period allowed for reconsideration under Public Resources Code section 25530. There has been no revocation of the Commission’s certification of the Gateway project under Public Resources Code section 25534. The Commission approved the change in ownership making PG&E the exclusive owner on January 3, 2007. Therefore, PG&E possesses a valid certification for this facility. ACORN is correct in its assertion that “PG&E should have received approval from the commission for (the) modifications before beginning constructions of these modifications and commencing operation.” (Complaint, p.10) But the 2001 certification for Gateway remains valid in the absence of a revocation under Public Resources Code section 25534.

ACORN cites Title 20, California Code of Regulations, sections 1709.8 and 1720.3 in support of Count 1 of its complaint. Neither section is applicable. Section 1709.8 sets forth

the process by which an applicant may withdraw an AFC. The applicant has not filed an AFC for Gateway. The AFC originally filed for the project resulted in approval and certification, which, as discussed above, is still valid. Because there is no AFC for Gateway for Commission review, section 1709.8 does not apply to the current situation. Section 1720.3 concerns the deadline to commence construction, which is five years from the date of certification, unless the applicant receives an extension of that deadline for good cause. Section 1720.3 does not concern “construction milestones” as argued by ACORN, but rather a five-year deadline to commence construction to avoid a lapse in certification. ACORN acknowledges on page 6 of its complaint that “[i]n late 2001, Mirant began constructing Unit 8.” The commencement of construction in 2001, the year of certification, avoids any issue under section 1720.3.

Based on the validity of PG&E’s certification for Gateway and the inapplicability of sections 1709.8 and 1720.3, which Gateway cites as support for Count 1, this first count in ACORN’s complaint is without merit, and the Commission should dismiss the count for lack of merit.

COUNT 2. PG&E Violated the Law by Not Complying with the Applicable Air Quality Standards Before Constructing and Operating the Facility, as Required by the Certification.

ACORN makes three separate assertions in support of this count. ACORN alleges first that PG&E did not obtain a Final Determination of Compliance (FDOC) from the Bay Area Air Quality Management District (BAAQMD) for Gateway. Second, ACORN alleges that PG&E does not have an Authority to Construct (ATC). Lastly, ACORN alleges that PG&E does not have a valid Prevention of Significant Deterioration (PSD) Permit, in violation of its 2001 Certification.

ACORN’s assertions regarding the FDOC reflect a misunderstanding of post-certification amendments and the original application proceeding. ACORN cites section 1744.5 of the Commission’s regulations to claim that the facility as built lacks a determination of compliance as required by that section. ACORN’s assertion overlooks the fact that section 1744.5 applies to the application proceeding, not to post-certification amendments. Section 1744.5 states in pertinent part, “The local air pollution control officer shall conduct, *for the commission’s certification process*, a determination of compliance review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations.” (Cal. Code Regs., tit. 20, § 1744.5, subd. (b); emphasis added.) Because the application process has been completed and resulted in a certification that remains valid, section 1744.5 ceases to apply to the constructed Gateway facility. What governs post-certification amendments is section 1769 of the Commission’s regulations. (Cal. Code Regs., tit. 20, § 1769.) Indeed, staff is reviewing PG&E’s May 8, 2009 Petition to Amend in accordance with section 1769.

With respect to an authority to construct (ATC), Public Resources Code Section 25500 vests with the Commission the “exclusive power to certify all sites and related facilities in

the state, whether a new site and related facility or a change or addition to an existing facility.” Section 25500 further provides that:

“The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law...and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.”

The Commission’s certification is issued in lieu of other required permits, such as the ATC. The Commission’s final decision, containing the conditions prescribed in the FDOC, serves as the authority to construct.¹ The district’s issuance of an ATC for a project under the Commission’s jurisdiction is a ministerial act to ensure the Commission’s decision, in fact, incorporates the district’s conditions in its FDOC. Here, the FDOC was initially released on February 6, 2001 during the Commission’s Application for Certification proceeding, and the ATC was originally issued on July 24, 2001. Staff notes that the owner has requested and received modifications from BAAQMD to the FDOC and the ATC since the initial release of those documents. Also, a current application for modification to both the FDOC and the ATC regarding the diesel fire pump engine is pending at BAAQMD, and that proposed modification also identifies the current, installed smaller dewpoint heater. Thus, the claim that the project owner did not obtain an FDOC or an ATC is incorrect.

As to the PSD Permit, staff notes that PG&E is working with the US Environmental Protection Agency (USEPA) to obtain an updated PSD permit as required by the 2001 Certification. Furthermore, even if the project currently lacked a PSD permit, the absence of such a permit would not invalidate the Commission’s certification. The enforcement authority over the specific terms and conditions of a PSD permit are with the USEPA.

Given that the Gateway facility obtained a valid FDOC and ATC, and that the PSD permit is outside of the Commission’s jurisdiction, Count 2 of ACORN’s complaint is without merit and should be dismissed.

COUNT 3. PG&E violated the Conditions of Certification by not obtaining the required Emissions Offsets.

ACORN alleges that “PG&E has not demonstrated that the complete emission offsets for the facility have been identified and obtained before commencing operations, as required by its certification and the Commission’s regulations” and that “PG&E cannot demonstrate compliance with the offset requirements because no final emission requirements have been set forth in a final air permit or in a revised certification.” (Complaint, p. 17)

ACORN overlooks the fact that the Gateway facility did surrender emission reduction credits in accordance with its 2001 certification. ACORN also overlooks the fact that the

¹ Exhibit 1, Memorandum of Understanding between ARB and Energy Commission, pages 7 - 8

Gateway facility was approved by the Commission to convert to dry cooling in 2006 and that the switch to dry cooling (through use of an air cooled condenser unit rather than a cooling tower) lowered the facility's particulate matter emissions, and facility permit limits and requirements for emission reduction credits were adjusted down accordingly. ACORN makes no claim that any discrepancies between recently installed equipment and what is certified causes a violation of any condition of certification.

Indeed, as to the current amendment for minor changes, staff has commenced analysis of the changes requested by PG&E in its May 8, 2009 Petition to Amend. Thus far, staff has determined that the dewpoint natural gas heater that is installed and operating is a smaller size than what current conditions of certification allow and, thus, does not cause a violation. Moreover, the installed natural gas heater emits less emissions per hour, per day and per year than what is otherwise allowed under current conditions of certification, and could result in lower facility emission limits and emission reductions accordingly. The diesel fire pump engine that is installed is not operating, pending a review by BAAQMD and approval by the Commission. Staff has reviewed the Health Risk Assessment for the proposed fire pump. If the diesel fire pump engine is approved by the Commission, it would have unit-specific emission and operating limits (for testing and maintenance only) and could operate under the existing overall facility emission limits.

In sum, staff's preliminary analysis of the changes that are the subject of the May 9, 2009 Petition to Amend indicate the likelihood of these changes not violating existing conditions of certification, and, where adjustments are required, they would likely lower the emission limits on the facility. Any discrepancies between installed equipment and what was originally certified are, therefore, better addressed in the amendment process, rather than a complaint proceeding. For these reasons, Count 3 in ACORN's complaint is without merit and should be dismissed. Alternatively, it should be addressed in the amendment proceeding where emission reduction requirements will be analyzed with respect to the minor changes proposed by PG&E.

COUNT 4: *PG&E Violated the Commission's Requirements for the Opportunity of Public Participation Before the Construction and Operation of Facilities.*

The amendment switching to dry cooling was approved in 2007 by the Commission after the required public process, at which time the public was afforded the opportunity to participate. PG&E has now submitted a new Petition to Amend certain Conditions of Certification to the project. Title 20, California Code of Regulations Section 1769(a)(3) provides in relevant part that a petition to amend "must be approved by the full commission at a noticed business meeting or hearing." The current petition to Amend has not yet been heard at a business meeting, nor will it be approved by the commission without the opportunity for public participation. Thus, the public will be afforded the opportunity to participate in the current Amendment proceedings. Given the above, this count is without merit and should be dismissed.

III. RECOMMENDATIONS

Title 20, California Code of Regulations, section 1237(e) sets forth the actions that the committee must take upon issuance of the staff report on a complaint:

Within 30 days after issuance of the staff report, the committee shall:

- (1) dismiss the complaint upon a determination of insufficiency of the complaint or lack of merit;
- (2) issue a written decision presenting its findings, conclusions, or order(s) after considering the complaint, staff report, and any submitted comments; or
- (3) conduct hearings to further investigate the matter and then issue a written decision.

Pursuant to section 1237(e)(1), staff recommends that the Committee dismiss all four counts in the complaint for lack of merit as discussed above. Alternatively, the Committee should issue a written decision under section 1237(e)(2) to transfer, in effect, the issue under Count 3 to the ongoing amendment proceeding for Gateway's May 8, 2009 Petition to Amend.

Staff notes that the issues raised in Count 3 of the Complaint are directly connected to the issues presented by PG&E's May 8, 2009 Petition to Amend. To the extent Count 3 sets forth allegations regarding the project's compliance with conditions of certification by not obtaining the required emission offsets, it raises issues that may be settled by the Commission approving the changes that are the subject of the current Petition to Amend. Count 3, if not dismissed, should therefore be addressed in the amendment proceeding for post-certification changes. Such consolidation of issues in the amendment proceeding would dispense with what could otherwise end up being duplicative or overlapping proceedings and would save valuable time and resources.

Date: July 3, 2009

Respectfully Submitted,

/s/
KEVIN W. BELL
Senior Staff Counsel